Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE Telephone Operators GTOC Tariff No. 1 GTOC Transmittal No. 1148	)	CC Docket No. 98-79
BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476	)	CC Docket No. 98-161
Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Transmittal No. 1986	)	CC Docket No. 98-103

OPPOSITION OF
SPLITROCK SERVICES, INC.

Splitrock Services, Inc. ("Splitrock"), by its undersigned counsel, hereby submits its comments in the above-captioned dockets.

I. Introduction

Splitrock is a Woodlands, Texas-based company that focuses on providing dial-up and dedicated Internet access to corporate customers, carriers, and Internet service providers ("ISPs") via Splitrock's nationwide asynchronous transfer mode ("ATM") network. Splitrock carries more than 800 million minutes of Internet traffic per month and is ranked among the top-performing nationwide ISPs. In addition to its Internet access services, Splitrock plans to launch other business services, such as Integrated Services Digital Network ("ISDN") video conferencing.

Splitrock has deployed approximately 80 ATM switches, and is capable of providing service to 55 percent to 60 percent of the United States. With the $261 million

Splitrock recently raised in the capital markets, Splitrock plans to rapidly build out its network, and by June 1999, Splitrock expects to have deployed 400 ATM switches and have the capability to serve 90 percent of the country.

In response to the Commission's investigation into the recent federal tariff filings of GTE, Bell South, and Pacific Bell (collectively the incumbent local exchange carriers, or "ILECs") for asymmetrical digital subscriber line service ("ADSL"), Splitrock has two main areas of comment. First, as this Commission has recognized for 15 years, ISPs are end users and purchase local service to communicate with their subscribers. Second, to the extent that the Commission plans to modify it long-held ISP policies, the Commission should initiate a notice of inquiry or notice of proposed rulemaking, rather than attempt to resolve these important issues through tariff adjudications.

II. Telecommunications from an end user to an ISP are purely intraLATA

Fifteen years of Commission jurisprudence, 21 decisions by state public service commissions and a recent court of appeals decision unanimously agree that the telecommunications service used by ISPs and their subscribers is local and properly regulated at the state level. The ILECs have presented absolutely no evidence to suggest that ISP-bound traffic differs depending on whether the call to the ISP is routed over standard copper loop facilities or facilities that employ ADSL technology.

Since 1983, the Commission has correctly recognized that enhanced service providers, which include ISPs, do not provide basic telecommunications services.[1] As the Commission recently noted in a report to Congress, ISPs "leverage [local] telecommunications

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[1] MTS and WATS Market Structure, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (1983).

connectivity to provide [Internet] services, but this makes them customers of telecommunications carriers rather than their competitors."[2] Likewise, in the Access Charge Reform docket, the Commission stated, "ISPs ... pay for their connections to the incumbent LEC networks by purchasing [local] services under **state** tariffs."[3]

The local nature of ISP communications with their subscribers similarly was affirmed by the Eighth Circuit Court of Appeals. As the Eighth Circuit noted, "ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data."[4] Similarly, every state decision on the jurisdictional nature of ISP traffic has ruled that it is intrastate.[5] Any Commission decision to the contrary would disrupt these decisions, and likely incite the ILECs to relitigate these issues state by state. Such an outcome would create unnecessary uncertainty in the industry and in the financial markets, and would disserve the public interest. For these reasons, if the Commission takes any action on the merits of the various tariff submissions under investigation, it should declare that telecommunications from an end user to an ISP located within the same exchange are local calls, and that state regulators have the jurisdiction to establish the rates for such traffic.

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2 *Federal-State Joint Bd. on Universal Service, Report to Congress*, CC Docket 96-45, ¶ 105 (1998) (emphasis added).

3 *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, ¶ 346 (1997) (emphasis added).

4 *Southwestern Bell Telephone et al. v. Federal Communications Commission*, Slip Op. No. 97-2618 at n.9 (8th Cir. Aug. 19, 1998).

5 The 21 states that have ruled on this issue include Arizona, Colorado, Connecticut, Florida, Illinois, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.

III. An ILEC tariff adjudication is not the appropriate procedure for attempting to resolve the contentious jurisdictional issues presented

Any change in the Commission's understanding of the jurisdictional nature of local calls to ISPs would profoundly impact 15 years of Commission decisions regarding access charges, universal service, expanded interconnection, the basic versus enhanced service classifications, and many other areas of Commission rules and policy. To the extent that the Commission wishes to consider modifying its position on the jurisdiction of ISP-bound traffic, it should do so through a broad inquiry or rulemaking proceeding, rather than through individual ILEC tariff investigations.

Profoundly changing jurisdictional rules through individual adjudications rather than through an inquiry or rulemaking would open the Commission to objections from the industry that it was "unfairly effectuating a general policy change without the necessary industry-wide data and commentary."[6] Indeed, a bedrock tenet of Administrative Law is that "[t]he object of [a] rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct .... Conversely, adjudication is concerned with determination of past and present rights and liabilities."[7] With these principles in mind, it seems clear that any Commission decision to re-evaluate its historical understanding of the jurisdictional classification of ISP-bound traffic must be made through a notice of inquiry or a notice of proposed rulemaking, rather than through a tariff adjudication.

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6 *Wisconsin Gas C. v. FERC*, 770 F.2d 1144 (DC Cir. 1985). *See also Quivira Mining Co. v. NRC*, 866 F.2d 1246, 1261 (10th Cir. 1989); *Hercules Inc. v. EPA*, 598 F.2d 97 (DC Cir. 1978).

7 *Telocator Network of America v. FCC*, 691 F.2d 525, n.196 (1982), quoting *American Airlines, Inc. v. CAB*, 359 F.2d 624.

IV. Conclusion

For the foregoing reasons, the Commission should declare that telecommunications from an end user to an ISP within the same exchange are jurisdictionally intrastate, or in the alternative, the Commission should establish an inquiry or rulemaking to develop a proper record on the important jurisdictional issues presented.

Respectfully submitted,

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September 18, 1998

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CERTIFICATE OF SERVICE

I, Arethea P. Johnson, hereby certify that I have served a copy of the "Opposition Of Splitrock Services, Inc." this 18th day of September, 1998, upon the following parties via hand delivery:

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